Office - Supreme Court, U.S.
FILED
JUN 16 1982
ALEXANDER L. STEVAS,
CLERK

NO. 81-2347

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1981

VERNON S. BODDICKER, RICHARD W. PEAY, HUGH L. THOMPSON and DWIGHT G. HUDSON,

Petitioners,

vs.

ARIZONA STATE DENTAL ASSOCIATION, AN Arizona Non-Profit Corporation; CENTRAL ARIZONA DENTAL SOCIETY, an Arizona Non-Profit Corporation; AMERICAN DENTAL ASSOCIATION, an Illinois Non-Profit Corporation,

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ALFRED L. RUEBEL
ERHARD, COX & RUEBEL, P. C.
211 North Ervay, Suite 500
Dallas, Texas 75201
(214) 741-6201

CARL W. DIVELBISS
101 North First Avenue, Suite 1950
Phoenix, Arizona 85003
(602) 257-8367
Attorneys for Petitioners

QUESTIONS PRESENTED FOR REVIEW

1. Did the United States Court of Appeals for the Ninth Circuit err in affirming the holding of the United States District Court that the compulsory cross-membership requirements between the three Respondents do not constitute an illegal tying arrangement in violation of the Sherman Act and the Clayton Act?

2. Did the United States Court of Appeals for the Ninth Circuit err in affirming the holding of the United States District Court that the compulsory cross-membership requirements between the three Respondents do not suppress competition between dentists in violation of the Sherman Act and the Clayton Act?

3. Did the United States Court of Appeals for the Ninth Circuit err in affirming the holding of the United States District Court that the Respondents have not monopolized the area of dental services supplied to dentists by these Respondents in violation of the Sherman Act?

4. Did the United States Court of Appeals for the Ninth Circuit err in failing to hold that the compulsory cross-membership requirements between the three Respondents constitutes an unreasonable restraint of trade as a matter of law in violation of the Sherman Act?

I N D E X

	Page
Questions Presented For Review	2
Opinions Delivered Below	3
Jurisdiction	3
The Statutory Provisions Involved	4
Statement of the Case	4
Reasons for Allowance of the Writ	8
Conclusion	26

TABLE OF AUTHORITES CITED

Cases:

Albrecht v. Herald Co., 390 U.S. 145, 149-50, n. 6, 88 S.Ct. 869, 871-872, n. 6, 19 L.Ed.2d 998 (1968) 15

Bogosian v. Gulf Oil Corp., 561 F.2d 434, 449 (3rd Cir. 1977), cert. denied 434 U.S. 1086, 98 S.Ct. 1280 (1978) 12

Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1, 19-20, 99 S.Ct. 1551, 1562 (1979) 24

Page

Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 100 S.Ct. 1925, 1928 (1980) 23

Chatham Condominium Associations v. Century Village, Inc., 597 F.2d 1002 (5th Cir. 1979) 10

Fortner II, 429 U.S. 610, 619-620, 97 S.Ct. 861, 867-868 (1977) 20

Goldfarb v. Virginia State Bar, 421 U.S. 773, 95 S.Ct. 2004 (1975) 8

Greenville Publishing Co., Inc. v. Daily Reflector, Inc., 496 F.2d 391, 396 (4th Cir. 1974) 23

H. A. Artists & Associates, Inc. v. Actors' Equity Association, U.S. , 101 S.Ct. 2102, 2106-7, 2113 (1981) 24

Heatransfer Corp. v. Volkswagenwerk, A. G., 553 F.2d 964, 975 (5th Cir. 1977). 12

Helix Milling Co. v. Terminal Flour Mills Co., 523 F.2d 1317, 1321-22 (9th Cir. 1975), cert. denied 423 U.S. 1053, 96 S.Ct. 782, 46 L.Ed.2d 642 (1976) 16

International Salt Co. v. U. S., 332 U.S. 392, 395-96, 68 S.Ct. 12, 14-15 (1947) 17

	Page
Miller v. Granados, 529 F.2d 393 (5th Cir. 1976)	10
Mims v. Kemp, 516 F.2d 21, 23 4th Cir. 1975)	23
Northern Pacific Railway Co. v. United States, 356 U.S. 1, 5-6, 78 S.Ct. 514, 518, 2 L.Ed.2d 545, 550 (1958)	10,11, 13,18, 20
Robinson v. Magovern, 521 F. Supp. 842, 907 (D.C. Pa. 1981)	15,21
Rosebrough Monument Company v. Memorial Park Cemetery Association, 666 F.2d 1130, 1142 (8th Cir. 1981)	16
Strax v. Commodity Exchange, Inc., 524 F.Supp. 936, 939-40 (D.C. N.Y. 1981)	22
Ungar v. Dunkin' Donuts of America, Inc., 531 F.2d 1211, 1218 (3rd Cir. 1976), cert. denied 429 U.S. 823, 97 S.Ct. 74 (1976)	10,13
United States v. Griffith, 334 U.S. 100, 107, 68 S.Ct. 941, 945 (1948)	18
U. S. v. Loew's, Inc., 371 U.S. 38, 49, 83 S.Ct. 97, 104, 9 L.Ed.2d 11 (1962)	17

Page

United States v. National Association of Broadcasters, 1982-1 Trade Cases, ¶ 64567, p. 73100 (D.C. D of C, March 3, 1982) 11

U. S. v. Paramount Pictures, Inc., 334 U.S. 131, 157-59, 68 S.Ct. 915, 929 (1948) 17

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1981
NO. _____

VERNON S. BODDICKER, RICHARD W. PEAY, HUGH L. THOMPSON and DWIGHT G. HUDSON,

Petitioners,

vs.

ARIZONA STATE DENTAL ASSOCIATION, an Arizona Non-Profit Corporation; CENTRAL ARIZONA DENTAL SOCIETY, an Arizona Non-Profit Corporation; AMERICAN DENTAL ASSOCIATION, an Illinois Non-Profit Corporation,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals For the Ninth Circuit, entered in this proceeding on March 24, 1982, and the denial of the Petition for Rehearing on May 7, 1982.

QUESTIONS PRESENTED FOR REVIEW

1. Did the United States Court of Appeals for the Ninth Circuit err in affirming the holding of the United States District Court that the compulsory cross-membership requirements between the three Respondents do not constitute an illegal tying arrangement in violation of the Sherman Act and the Clayton Act?

2. Did the United States Court of Appeals for the Ninth Circuit err in affirming the holding of the United States District Court that the compulsory cross-membership requirements between the three Respondents do not suppress competition between dentists in violation of the Sherman Act and the Clayton Act?

3. Did the United States Court of Appeals for the Ninth Circuit err in affirming the holding of the United States District Court that the Respondents have not monopolized the area of dental services supplied to dentists by these Respondents in violation of the Sherman Act?

4. Did the United States Court of Appeals for the Ninth Circuit err in failing to hold that the compulsory cross-membership requirements between the three Respondents constitutes an unreasonable restraint of trade as a matter of law in violation of the Sherman Act?

OPINIONS DELIVERED BELOW

There was no formal opinion of the United States District Court for the District of Arizona. However, the District Court did enter a Minute Entry dated March 3, 1975, dismissing the Amended Complaint, which said Order is reproduced in Appendix A to this Petition.

Appearing as Appendix B to this Petition, is the initial Opinion of the Court of Appeals, reversing the District Court, as reported in 549 F.2d 626 (1977).

Reproduced in Appendix C is the Order of this Court denying Certiorari, on October 3, 1977.

Appearing as Appendix D are the Findings of Fact, Conclusions of Law and Judgment, as entered by the District Court on August 29, 1980.

Appearing as Appendix E is the Memorandum Decision of the Court of Appeals, Ninth Circuit, entered March 24, 1982.

Appearing as Appendix F is the Order of the Court of Appeals, Ninth Circuit, denying the Petition for Rehearing, entered May 7, 1982.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on March 24, 1982 (App. E, infra). A timely Petition for Rehearing was denied on May 7, 1982 (App. F, infra). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

THE STATUTORY PROVISIONS INVOLVED

This action involves §§ 1 and 2 of the Sherman Act (Title 15, U.S.C., §§ 1 and 2) and § 16 of the Clayton Act (Title 15, U.S.C., § 26, as amended). See Apps. G, H and I, infra.

STATEMENT OF THE CASE

Petitioners are all licensed dentists within the State of Arizona. Petitioners Peay, Thompson and Hudson are engaged in active practice, Petitioner Boddicker, for reasons hereinafter discussed, having terminated his practice in 1974. Respondent Arizona State Dental Association (hereinafter "ASDA") is an Arizona non-profit corporation, incorporated in 1951. Respondent Central Arizona Dental Society (hereinafter "CADS") is also an Arizona non-profit corporation, incorporated in 1961. The ASDA and CADS maintain a joint office and place of business in Maricopa County, Arizona. Respondent American Dental Association (hereinafter "ADA") is an Illinois non-profit corporation, having its principal office and place of business at Chicago, Illinois. Respondent ADA has, by its Bylaws, designated Respondents ASDA and CADS as constituent and component societies, respectively, of the ADA, and has required Respondents ASDA and CADS, as a condition to membership in the ASDA and CADS, to require their respective members to not only pay dues for the said State and local societies but, in addition, to also pay dues for membership in the ADA. This practice has been acquiesced in, nurtured, supported and enforced by the

Respondents ASDA and CADS and, in addition, has been implemented in the Bylaws of the ASDA and CADS. Thus, a dentist practicing within Maricopa County, Arizona, wishing to become a member of the CADS, tenders his application to the CADS, along with the dues for the ASDA and ADA. Upon acceptance of his membership by the CADS, he automatically becomes a member of the ASDA and ADA. Out of the total amount of dues tendered with his application, the CADS retains its portion, remitting the balance to the ASDA, which extracts its portion and remits the ADA portion to its offices at Chicago, following which the dentist is automatically enrolled as a member of the ADA. The ADA does not even so much as see a copy of the membership application, enrolling the member strictly on the basis of the remittance by the ASDA.

The foregoing procedure, as to the initial enrollment of a member, is also followed in the collection of the annual membership dues, in that the CADS collects the entire amount of the dues for the CADS, ASDA and ADA, with the remittance and transmittal being as aforesaid. The procedure followed in Arizona is identical to the procedure followed in each and every State of the United States where there is a constituent and/or component society of the ADA. Admittedly, (1) there is no dentist who is a member of any constituent or component society who is not also a member of the ADA (Plaintiffs' Exhibit 50, p. 13 - ADA Answer to Plaintiffs' Interrogatory No. 59), and (2) there is no State within the United States in which a constituent society of the ADA does not exist (Pretrial Order, p. 14, Lines 6-7, CR178).

Membership in the ADA does not require the showing of any particular professional ability or professional expertise. R.T., Vol. 1, p. 60, Line 23 - p. 61, Line 10.

Petitioners' evidence shows that they, as well as all other dentists similarly situated, derive particular benefits from membership in the CADS and, to a lesser degree, in the ASDA, but with only nominal, if any, benefit from membership in the ADA; that the only benefit which might be derived from membership in the ADA is the receiving of the Journal of the American Dental Association, but which can be obtained without ADA membership. The primary, and most important, benefit derived from membership in the CADS is the continuing dental educational programs conducted and made available by said Society, plus the opportunity for exchange of information with fellow practitioners who are also CADS members and the referral of patients by fellow members. And the ASDA, although providing only a limited continuing educational program, does have an insurance program which is important to its members. Petitioners' testimony shows, specifically, that the professional skills of any dentist are enhanced or increased by his membership in the CADS; that CADS membership enables a dentist to have a more efficient and professional operation of his office than a non-member.

The evidence of the Petitioners also shows that, without membership in the ADA, Petitioners and all other dentists similarly situated are deprived of the right to belong to any specialty group, or any professional

and/or technical society recognized by the Respondent ADA.

The activities of the ADA are all conducted in interstate commerce, including the extraction of dues from Petitioners and all other dentists similarly situated, both in Arizona and each of the other States. In 1972, the ADA collected dues in excess of $6,000,000.00. By 1979, this figure had climbed to almost $15,000,000.00. In the same period of time, the annual ADA dues have increased from $70.00 per year to $150.00 per year, with a further increase to $300.00 per year under consideration.

Both Petitioner Boddicker and Petitioner Peay objected to the payment of dues for the ADA and, for the year 1972, tendered dues for only the CADS and ASDA. Each was threatened with expulsion from membership unless the dues for all three organizations were paid. See Plaintiffs' Exhibits 39-45. Dr. Boddicker refused to pay the ADA dues and was expelled from membership in all three organizations. Dr. Peay, not wanting to be deprived of his membership in the CADS, finally relented and paid the dues for all three organizations, doing so under protest. Dr. Boddicker, a prosthodontist, whose practice depended upon referrals, continued in practice until mid-1974, when he finally decided to terminate his practice, due to the fact that he ceased receiving any referrals from the CADS, plus a diminishing of the referrals from CADS members.

The Petitioners testified that, except for the mandatory membership requirements, as aforesaid, they would not have retained

membership in the ADA. R.T., Vol. 1, p. 89, Lines 20-25; R.T., Vol. 2, p. 11, Line 21 - p. 12, Line 1 and p. 37, Lines 12-17.

REASONS FOR ALLOWANCE OF THE WRIT

This Petition raises questions of national importance involving the application of the antitrust laws and, particularly, to professional organizations.

Although this action was brought by only four dentists, the facts involve thousands of other dentists similarly situated, scattered throughout the United States. And a great deal of confusion exists as to the relative rights and obligations of professional organizations and their members, beginning with Goldfarb v. Virginia State Bar, 421 U.S. 773, 95 S.Ct. 2004 (1975), with each case having its own peculiar set of facts, with the result that each successive case has plowed almost virgin soil.

This case can have a resounding application to dozens and dozens of professional organizations in the United States. Therefore, it is deserving of careful consideration, and something other than the cavalier treatment it has received in the District Court and most recently, in the Court of Appeals.

Each of the three Respondents is a unique organization. Likewise, in other States, the respective constituent and/or component society is also a unique organization. For a dentist who is disinterested in all of the organizations, there is no market for any of

them. But to another dentist, there may be a market for one or more, but not all, of the Respondent organizations. But the Respondents, by their membership arrangement, have created a forced market for the unwanted and/or undesired organization membership. Where a dentist desires to belong to his local (component) society, and even though he may, as a matter of judgment, and perhaps because of his particular situation, determine he has no need to belong to the constituent and/or national organization, he is, nevertheless, as a condition to membership in his component society, compelled to also pay membership dues for, and to join, his constituent and national organizations.

Thus, the Court commits a basic error when it confuses lack of a "competitive market" with a forced market, i.e., an unwanted membership in one or more of the Respondent organizations.

It is fallacious to state that

> "Membership in the local and state groups cannot be characterized as a product or service distinct from ADA membership.",

for, as we have seen, a dentist in the Federal Dental Services (Army, Navy, VA, Public Health Service) is allowed to obtain membership in the ADA, but without membership in a constituent or component society. Thus, the ADA, at least, gives recognition to a separate and distinct ADA membership.

The undesired or unwanted membership can be compared to a product or merchandise which a party is required to purchase as a part of a tying arrangement in order to obtain a desired product, even though he has no need, and there is no "competitive market" for the tied product. See Chatham Condominium Associations v. Century Village, Inc., 597 F.2d 1002 (5th Cir. 1979), where condominium developers, in the sale of a condominium, required the purchaser to enter into a 99-year recreational facilities lease; and also Miller v. Granados, 529 F.2d 393 (5th Cir. 1976), where a condominium developer, in the sale of a condominium, required the purchaser to enter into an operational management agreement.

In Ungar v. Dunkin' Donuts of America, Inc., 531 F.2d 1211, 1218 (3rd Cir. 1976), cert. denied 429 U.S. 823, 97 S.Ct. 74 (1976), the Court, quoting from the Northern Pacific Railway Company landmark case, says:

> "Northern Pacific Ry. v. United States, 356 U.S. 1, 5-6, 78 S.Ct. 514, 518, 2 L.Ed.2d 545, 550 (1958), perhaps the fountainhead of tying law under § 1 of the Sherman Act, provided the following exposition of the theory of the law of tying:
>
> "For our purposes a tying arrangement may be defined as an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any

other supplier. Where such conditions are successfully exacted competition on the merits with respect to the tied product is inevitably curbed. Indeed 'tying agreements serve hardly any purpose beyond the suppression of competition.' Standard Oil Co. of California and Standard Stations v. United States, 337 U.S. 293, 305-306, 69 S.Ct. 1051, 1058, 93 L.Ed. 1371. They deny competitors free access to the market for the tied product, not because the party imposing the tying requirements has a better product or a lower price but because of his power or leverage in another market. At the same time buyers are forced to forego their free choice between competing products."

In United States v. National Association of Broadcasters, 1982-1 Trade Cases, ¶ 64567, p. 73100 (D.C. D of C, March 3, 1982), the issue involved a regulation prohibiting a television station from advertising more than one product in a commercial lasting less than sixty seconds. In passing, and declaring a per se violation, and in reference to Northern Pacific Railway Co. v. U. S., supra, the Court stated (at pp. 73109-10):

"The tying cases, to be sure, are not technically applicable in this instance because the additional amount of commercial time advertisers are required to purchase under the multiple product standard does not represent a 'different product' from the time the advertisers actually desire to purchase. However, the rationale

> underlying the rule against tying--that sellers should be precluded from using their market power to force a buyer to purchase and to pay for something he does not want--applies precisely in this case. NAB has used its dominance in the television industry to require companies who desire to advertise more than one product on television to buy more than they wish to purchase. Thus, the coercive use of market power to restrict buyers' decision-making which is at the heart of tying is also present in the provision at issue here. See P. Areeda, Antitrust Analysis ¶ 541 (1981)." (Underscoring inserted.)

In Bogosian v. Gulf Oil Corp., 561 F.2d 434, 449 (3rd Cir. 1977), cert. denied 434 U.S. 1086, 98 S.Ct. 1280 (1978), the Court, in commenting upon Ungar, states:

> "It has never been an element of plaintiff's case to disprove, nor even a permitted defense, that the tied product is superior to others available on the market, or that even without the tie requirement plaintiff would have purchased the tied product. * * *" (Underscoring inserted.)

See also Heatransfer Corp. v. Volkswagenwerk, A. G., 553 F.2d 964, 975 (5th Cir. 1977).

To prove a per se illegal tie-in, a claimant must establish three things:

(1) "* * * an agreement by a party to sell one product but only on the

condition that the buyer also purchases a different (or tied) product * * *" Northern Pacific Railway Co. v. U. S., supra, 356 U.S. at p. 5, 78 S.Ct. at 518, 2 L.Ed.2d at 550;

(2) That the seller

"has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product. * * *" Ibid. at p. 6; and

(3) that

"a 'not insubstantial' amount of interstate commerce is affected." Ibid. Ungar v. Dunkin' Donuts of America, Inc., 531 F.2d 1211, 1223-24 (3rd Cir. 1976), cert. denied 429 U.S. 823, 97 S.Ct. 74 (1976).

The activities of the ADA run a gamut ranging from the sale of hundreds of catalog items to the sale of various publications, including the ADA Journal and the solicitation of advertising therefor, accreditation of dental programs for hospitals, colleges and universities, and a host of other material, services and programs, none of which are independently offered by any of the constituent and component societies. On the other hand, the State (constituent) society offers a separate and distinct group of products and services to its members. Likewise,

the local (component) society offers a third group of products and/or services, such as referral services, seminars, education programs and, most importantly, exchange of ideas and information with fellow members. The testimony of the Petitioners was that, in the order of importance, the local society was the most important, followed by the State society and, to a much lesser degree, the ADA. However, as we have seen, regardless of the importance of the programs and/or services rendered by either organization, or the reasons for membership, or the benefits to be derived therefrom, a dentist has no choice and, accordingly, must support all three organizations and their programs, whatever they might be, in order to have the benefit of the program of one organization.

The ADA has been in existence for approximately ninety years, the ASDA since 1951, and the CADS since 1961, and the tying membership arrangement has been in effect during the entire period the ASDA and CADS have been in existence. But in considering the question of economic power "with respect to the tying product", and although the ADA, by its By-laws, and prior to 1951, established requirements as to membership, the CADS and ASDA, and likewise all constituent and component societies in the United States, have nurtured, acquiesced in and, frankly, enforced the membership requirements, as imposed by the ADA. Based upon the testimony, it would appear that, on a local basis at least, the CADS has economic power equal to that of the ASDA or the ADA. Locally, it is

the CADS which offers the greatest benefits to a dentist, and the CADS, like the ASDA and the ADA, has "the only game in town", with the result that a dentist has no alternative in seeking the services offered by the CADS, and is compelled, whether voluntarily or involuntarily, to support, and be a member of, the ASDA and the ADA.

The Ninth Circuit Opinion states:

> "Finally, even if ADA membership is a product distinct from membership in the ADA's constituent and component societies, the latter derive no economic benefit from sales of ADA memberships, the alleged 'tied product' so that no per se illegal tying arrangement can be found."

However, in Robinson v. Magovern, 521 F. Supp. 842, 907 (D.C. Pa. 1981), it is said:

> "A court will find the necessary collaboration even where the first entity does not receive any benefit from the concerted activity and acts only in response to coercion.",

citing Albrecht v. Herald Co., 390 U.S. 145, 149-50, n. 6, 88 S.Ct. 869, 871-872, n. 6, 19 L.Ed.2d 998 (1968) which, in dealing with this same question, says:

> "The combination with retailers arose because their acquiescence in the suggested prices was secured by threats of termination; the combination with wholesalers arose

> because they cooperated in terminating price-cutting retailers." (Underscoring inserted.)

Thus, the law seems to be that if a person, willingly or unwillingly, with or without coercion, and with or without receiving any benefit, goes along, either actively, or by mere acquiescence, an illegal combination has been established. See also Helix Milling Co. v. Terminal Flour Mills Co., 523 F.2d 1317, 1321-22 (9th Cir. 1975), cert. denied 423 U.S. 1053, 96 S. Ct. 782, 46 L.Ed.2d 642 (1976).

Thus, the statement that the CADS derives no economic benefit from sales of ADA membership cannot be sustained because the membership of the CADS is supported by either the ASDA or ADA each time a dentist seeks membership in either organization, at which time he is compelled to accept membership in the other two organizations. Regardless of which door he knocks at, he always winds up back at the door of his component society. In other words, each of the three Respondent organizations benefits every time a dentist desires membership in any one of the three organizations.

To summarize on the question of the tying arrangement and its necessary elements, we go to Rosebrough Monument Company v. Memorial Park Cemetery Association, 666 F.2d 1130, 1142 (8th Cir. 1981), where the Court says:

> "Monopoly power or dominance in the tying market need not be shown. Fortner I, supra, 394 U.S. at 502,

89 S.Ct. at 1258; Northern v. McGraw-Edison Co., supra, 542 F.2d at 1347. Sufficient economic power exists if the supplier of the tying product has sufficient leverage in the market to increase prices or to force a significant number of buyers to accept burdensome terms. Fortner I, supra, 394 U.S. at 501-03, 89 S.Ct. at 1257-58.

"It is unnecessary for appellant to prove by voluminous economic data that appellees have a strangle hold on the tying market. See Markovits, Tie-Ins, Reciprocity, and the Leverage Theory, 76 Yale L.J. 1397 (1967). Where the sellers are of sufficient size to exert some power, control or dominance over the tying product, the threshold standard of economic power has been met. Osborn v. Sinclair Refining Co., 286 F.2d 832, 838 (4th Cir. 1960) (Osborn) (illegal tying arrangement for supply of oil and machinery), cert. denied, 366 U.S. 963, 81 S.Ct. 1924, 6 L.Ed.2d 1255 (1961).",

and further stating:

"* * * we find that in order to answer the question of economic power we look to whether the characteristics of the tying product are unique.",

citing International Salt Co. v. U. S., 332 U.S. 392, 395-96, 68 S.Ct. 12, 14-15 (1947); U. S. v. Paramount Pictures, Inc., 334 U.S. 131, 157-59, 68 S.Ct. 915, 929 (1948); U. S. v. Loew's, Inc., 371 U.S.

38, 49, 83 S.Ct. 97, 104, 9 L.Ed.2d 11 (1962); and, of course, Northern Pacific, supra, 356 U.S. at 8-12, 78 S.Ct. at 519-21.

The interstate commerce question is no longer an issue in this case, the Respondents having conceded that the interstate commerce question has been satisfied, and the District Court so found.

Both the District Court and the Court of Appeals completely missed the point on the question of suppression of competition, restricting the issue to simply "competition between dentists".

The basic flaw stems from the fact that the Respondents, by their membership tying arrangement, have eliminated competition as between themselves. It has been repeatedly held that

> "The anti-trust laws are as much violated by the prevention of competition as by its destruction. * * *". United States v. Griffith, 334 U.S. 100, 107, 68 S.Ct. 941, 945 (1948).

Thus, when either of the Respondents collects a membership fee, each of the other two Respondents also receives a fee. Rivalry has fallen by the wayside. However, in maintaining the unlawful combination, a dentist who chooses to support, and to belong to, his local organization, is penalized, in that he, along with his thousands of co-practitioners, must earn those additional dollars to not only pay the membership for his local society, but

for his State and national organizations. Furthermore, from a strictly local standpoint, the evidence shows that since the inception of this litigation, dentists, who are not members of any of the Respondent organizations, have been allowed to participate in the educational courses, being charged the same fees as the member dentists, but the member dentist is penalized because, in addition to the fees for the educational courses, he is also paying for a membership fee in each of the Respondent organizations. Thus, competition is suppressed as between dentists, as a direct and proximate result of the membership arrangement among the Respondents, forcing a dentist to pay out money for a membership which he may not want.

Petitioners testified, and Respondents did not seriously dispute, that those dentists who belong to the CADS have better skills, make more money, and are better able to serve the public and, therefore, the quality of care is improved, with the resulting benefit to the general public. But, to gain those skills, increase his earnings and enhance his expertise, a dentist is saddled with the cost of belonging to the other two Respondent organizations. In other words, by not being able to belong to the CADS, if he should so choose, and being required to also belong, and to pay dues, to the ASDA and the ADA, his costs are increased, with a proportionate decrease in his income, with the result that there is a lessening of competition between dentists. As we have seen, in 1972, the ADA collected dues in excess of $6,000,000.00. By 1979, this figure had

climbed to almost $15,000,000.00. That sum was contributed by approximately 80% of the dentists practicing within the United States, and serves to reduce the income and/or purchasing power of the dentist or, if he passes it on to his patients, it is another burden carried by the general public.

Finally, there is the statement by the Ninth Circuit that

> "* * * the District Court did not err in finding that the defendant organizations have not monopolized the practice of dentistry in Arizona. These organizations, in fact, do not engage in the practice of dentistry, nor is membership in them a precondition for an Arizona dental license."

Of course, we have to concede that the Respondents do not practice dentistry, but what about the grasp--the strangle hold--by which the Respondent organizations hold their respective (identical) members?

In Fortner II, 429 U.S. 610, 619-620, 97 S.Ct. 861, 867-868 (1977), the Court, in discussing the question of monopoly, and making reference to International Salt, Paramount Pictures, Loew's, and Northern Pacific, supra, stated:

> "As the Court plainly stated in its prior opinion in this case, these decisions do not require that the defendant have a monopoly or even a dominant position throughout the

market for a tying product. See 394 U.S. at 502-503, 89 S.Ct. at 1258. They do, however, focus attention on the question whether the seller has the power, within the market for the tying product, to raise prices or to require purchasers to accept burdensome terms that could not be exacted in a completely competitive market. In short, the question is whether the seller has some advantage not shared by his competitors in the market for the tying product."

And a similar statement appears in Robinson v. Magovern, 521 F.Supp. 842, 886-887 (D.C. Pa. 1981), where the Court says:

"In order to establish that a defendant has committed the offense of monopolization, the plaintiff must prove '(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.' United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S.Ct. 1698, 1703-04, 16 L.Ed.2d 778 (1966). A defendant possesses monopoly power if it has the ability to change the competitive variables of a product to the disadvantage of consumers without causing effective competitors to enter the relevant market. See United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 391-92, 76 S.Ct. 994, 1004-05, 100 L.Ed. 1264 (1956); American Tobacco Co. v. United States, 328 U.S. 781, 811, 66 S.Ct.

1125, 1139, 90 L.Ed. 1575 (1946)."

And the Court's discussion of the market percentage necessary to constitute a monopoly, on Page 887, certainly is most applicable to this case, clearly demonstrating that the three Respondent organizations very definitely have a monopoly in their respective sphere of operation. And, as we have shown, although the dues of the Respondent organizations continue to increase, an "effective" competitor has not entered the "relevant market".

The fact that the Respondents do not practice dentistry does not lessen their ability to gain a strangle hold on their membership and, by their unlawful membership tying arrangement, to extract fees from the dental profession, and thereby cause damage. In other words, it is the dentist who stands within the range of fire of the Respondents who suffers. Every dentist, whether he be, or not be, a member of the Respondent organizations, is necessarily, and directly, affected by their activities. A similar situation is to be found in Strax v. Commodity Exchange, Inc., 524 F.Supp. 936, 939-40 (D.C. N.Y. 1981), which was a class action brought against silver buyers, commodity brokerages, commodity exchanges, and others for alleged antitrust violation and for alleged violations of the Commodity Exchange Act. The defendants argued that the complaint was defective because Strax did not allege that he or the members of the proposed class

> "* * * entered into transactions directly with the defendants, * * *"

However, Strax contended that he traded in the very market which the defendants are alleged to have manipulated, although not directly with the defendants, and that proof of the impact of defendants' alleged action on that market would not require speculation or attenuated theories of causation. The Court upheld the contention of Strax, on the basis that he and the group which he proposed to represent were within the "target area" of the defendants' alleged anticompetitive behavior;

> "* * * that is, their anticompetitive behavior was 'aimed' at the plaintiffs."

And we have that exact same situation here, in that the Petitioners, and all other dentists similarly situated, are within the target area of the activities of the Respondents. Petitioners, and all other dentists similarly situated, have been made to "feel the squeeze of a conspiracy" and, therefore, have standing to bring this action. Greenville Publishing Co., Inc. v. Daily Reflector, Inc., 496 F.2d 391, 396 (4th Cir. 1974); Mims v. Kemp, 516 F.2d 21, 23 (4th Cir. 1975).

It has been repeatedly held that

> "When a particular concerted activity entails an obvious risk of anticompetitive impact with no apparent potentially redeeming value, the fact that a practice may turn out to be harmless in a particular set of circumstances will not prevent its being declared unlawful per se." Catalano,

Inc. v. Target Sales, Inc., 446 U.S. 643, 100 S.Ct. 1925, 1928 (1980); see also Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1, 19-20, 99 S.Ct. 1551, 1562 (1979).

Again, to focus the issues, we pose the following questions:

A. Without the tying arrangement:

(1) Would all dentists who obtained membership in their constituent and component societies also, voluntarily, obtain membership in the ADA?

(2) Would all dentists obtain membership in both their constituent and component societies, or would they only obtain membership in one such organization?

B. If ADA membership is of value and importance to a dentist, would not the average dentist obtain membership in the ADA, even on a voluntary, non-compulsory basis?

The Respondents cannot contend that questions A.(1) and B must be answered in the negative. And if said questions can be answered in the affirmative, then the Respondents, and particularly the ADA, have nothing to worry about. See H. A. Artists & Associates, Inc. v. Actors' Equity Association, ____ U.S. ____, 101 S.Ct. 2102, 2106-7, 2113 (1981), where agents were

required to pay franchise fees to Equity, and the Court posed the question:

> "If Equity did not impose these franchise fees upon the agents, there is no reason to believe that any of its legitimate interests would be affected."

It seems only reasonable to assume that if the ADA provides any and all of the services and benefits to the dental profession, as contended by the Respondents, its membership would not suffer if placed on a voluntary basis. For example, the American Bar Association only requires that an applicant for membership be duly licensed to practice in some State, and with no requirement as to membership in any other organization. Nevertheless, the ABA, over the years, has maintained a membership consisting of a certain percentage of all lawyers in the United States, and with very little variance in its membership, as related to the total number of licensed lawyers.

Respondents have never so much as even suggested any valid reason as to just why membership in the three Respondent organizations should be on an all-or-none basis, and without any choice, except as to those dentists in the Federal Dental Service.

The fact that membership in any of the Respondent organizations is not a condition to practice, does not minimize the claim of monopoly, but the fact that three (3) corporations have conspired to kill competition as between themselves and thus

deny a dentist such freedom of choice as his professional standing, specialty, or goal, coupled with his pocketbook, may dictate, certainly does suppress competition as between dentists, particularly as to the dentist who, for whatever reason, finds himself in a position of not being able to afford the total cost as mandated by the Respondents, and also the ADA and any other constituent and component societies. A dentist who is compelled to accept, and pay for, membership in his constituent society and the ADA, as a condition to membership in his component society, suffers financially and, in addition, his costs in providing dental services to his patients are thereby increased, with resulting damage to himself and to the public at large.

As to any of the Respondents, including any other constituent and/or component society, if they, or any of them, have merit and perform an important function for a dentist, he will purchase a membership, and without compulsion.

Under the facts, and the law of the cases cited, it seems clear that the tying arrangement maintained by the Respondents constitutes a per se violation and, therefore, Petitioners are entitled to judgment as a matter of law.

CONCLUSION

In summary, it clearly appears that:

A. The decision of the Ninth Circuit Court of Appeals, in affirming the judgment of the District Court, is

clearly in conflict with the decisions of other Federal Courts of Appeals on the same subject matter;

B. The Ninth Circuit Court of Appeals, in its opinion, has so far departed from the accepted and usual course of judicial proceedings, as to call for an exercise of the power of supervision of this Court;

C. The decision of the Ninth Circuit Court of Appeals is in conflict with the applicable decisions of this Court, as above set forth.

WHEREFORE, for the reasons set forth in this Petition, a Writ of Certiorari should be granted.

DATED: June 11, 1982.

RESPECTFULLY SUBMITTED,

ERHARD, COX & RUEBEL, P. C.
CARL W. DIVELBISS

By
Carl W. Divelbiss
Attorneys for Petitioners

APPENDIX